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ATTORNEYS FOR APPELLANT:

JAMES A. SHOAF
Columbus, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GEORGE P. SHERMAN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MATTHEW HERRON,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 03A04-0701-CR-55
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D Monroe, Judge
Cause No. 03D01-0208-FB-1134

September 10, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Matthew Herron appeals from the twenty-year executed sentence imposed following his guilty plea to Class B felony battery.¹ We affirm.

FACTS

On July 13, 2002, Matthew Herron called 911 in Columbus, claiming that his three-month-old daughter S.H. had fallen off the couch and was unresponsive. Later, Herron admitted to shaking S.H. in an attempt to revive her and finally admitted to shaking her in an attempt to quiet her. As it happened, S.H. suffered an acute subdural hematoma and retinal hemorrhaging in both eyes, sustained severe brain damage, and now endures cerebral palsy, permanent blindness, seizures, and a total loss of control over her extremities and bodily functions. Additionally, S.H. suffers from breathing difficulty that will lead to heart problems, and it is probable that she will require a permanent tracheotomy and the insertion of a permanent feeding tube at some point.

On August 1, 2002, the State charged Herron with Class B felony battery, Class B felony aggravated battery, and Class B felony neglect of a dependent. On February 5, 2005, Herron's trial on these charges ended in a mistrial when the jury was unable to reach a unanimous verdict. On August 14, 2006, Herron pled guilty to Class B felony battery in exchange for the dismissal of a Class D felony escape charge. The trial court sentenced Herron to twenty years of incarceration. The trial court found, as aggravating circumstances, that the harm to S.H. was much greater than required to prove the elements of the crime, Herron had a criminal history, S.H. was under twelve years old, S.H. was in Herron's sole

custody and care at the time, and S.H.'s injuries were the result of shaken baby syndrome. The trial court found Herron's guilty plea to be a mitigating circumstance, although "significantly negated" by the benefit Herron received and "even more negated" by Herron's failure to accept responsibility. Tr. at 58.

DISCUSSION AND DECISION

I. Whether Herron's Sentence is Appropriate

We "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). "Although appellate review of sentences must give due consideration to the trial court's sentence because of the special expertise of the trial bench in making sentencing decisions, Appellate Rule 7(B) is an authorization to revise sentences when certain broad conditions are satisfied." *Shouse v. State*, 849 N.E.2d 650, 660 (Ind. Ct. App. 2006), *trans. denied* (citations and quotation marks omitted).

The nature of Herron's offense was the battery of his own three-month-old daughter, leaving her permanently and profoundly disabled. S.H. is blind, unable to control her limbs or bodily functions, is "essentially unresponsive to normal environmental stimuli[,]" and will not ever improve. App. at 98. As for Herron's character, it is that of a remorseless serial criminal who has never taken full responsibility for this crime and has chosen not to reform himself despite his numerous contacts with the criminal justice system and opportunities to

¹ Ind. Code § 35-42-2-1(a)(4) (2002).

receive help. We believe that a fair indicator of Herron's character is that there is nothing in the record to indicate that he feels any remorse for his actions or concern for S.H.'s (or her mother's) plight. When asked how he felt about S.H., Herron said only "that he did not like to talk about her because he does not like to think about her condition." App. at 93.

Moreover, although only twenty-one at the time of the instant crime, Herron had already amassed an extensive juvenile and criminal history. Beginning in 1997 as a juvenile, Herron had true findings for marijuana possession, runaway, auto theft, resisting law enforcement, reckless driving, and two counts of criminal mischief. As an adult, Herron has prior convictions for Class D felony auto theft, two counts of Class C misdemeanor illegal consumption, and two counts of Class A misdemeanor driving while suspended.

Additionally, the record indicates that Herron was on probation when he committed this crime and has resisted treatment in the past. Herron ran away from a placement at the New Creations Christian Boarding School in 1994 and fled just prior to placement in a foster home later that year. Herron received 123 "major disciplinary actions" during his two-year tenure at the Gibault school from 1995 to 1997. App. at 94. In short, Herron's history and actions indicate an unwillingness to conform his behavior to societal norms and a failure to even acknowledge that he has a problem, this despite frequent punishment and refused opportunities for help. We conclude that, in light of the nature of his offense and his character, Herron's twenty-year sentence is appropriate.

II. Whether the Trial Court Abused its Discretion in Sentencing Herron

“In general, ‘the law in effect at the time that the crime was committed is controlling.’” *Walsman v. State*, 855 N.E.2d 645, 650 (Ind. Ct. App. 2006), *reh’g denied* (2007) (citing *Holsclaw v. State*, 270 Ind. 256, 261, 384 N.E.2d 1026, 1030 (1979)). Because Herron committed his crime in 2002, we will therefore apply the law in effect at that time. In 2002, if a trial court relied on aggravating or mitigating circumstances to deviate from the presumptive sentence, it was required to (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance has been determined to be mitigating or aggravating; and (3) articulate the court’s evaluation and balancing of circumstances. *Wooley v. State*, 716 N.E.2d 919, 929 (Ind. 1999) (citing *Harris v. State*, 659 N.E.2d 522, 527-28 (Ind. 1995)). When a sentence more severe than the presumptive is challenged on appeal, the reviewing court will examine the record to insure that the sentencing court explained its reasons for selecting the sentence it imposed. *Francis v. State*, 817 N.E.2d 235, 237 (Ind. 2004) (citing *Lander v. State*, 762 N.E.2d 1208, 1215 (Ind. 2002)). As the Indiana Supreme Court recently noted, one thing as true in 2002 as it is today is that “sentencing decisions rest within the sound discretion of the trial court and are reviewed on appeal only for an abuse of discretion.” *Anglemeier v. State*, 868 N.E.2d 482, 490 (Ind. 2007) (citing *Smallwood v. State*, 773 N.E.2d 259, 263 (Ind. 2002)). “An abuse of discretion occurs if the decision is “‘clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom.’” *Id.* (citing *K.S. v. State*, 849 N.E.2d 538, 544 (Ind. 2006)).

Herron contends only that the trial court abused its discretion in declining to accord his mental illness and troubled youth any mitigating weight and in failing to accord his guilty plea enough mitigating weight. When a defendant offers evidence of mitigating circumstances, the trial court has discretion to determine whether the factors are mitigating, and the trial court is not required to explain why it does not find the proffered factors to be mitigating. *Stout v. State*, 834 N.E.2d 707, 710 (Ind. Ct. App. 2005), *trans. denied*. The trial court is not required to give the same weight to mitigating evidence as does the defendant. *Fugate v. State*, 608 N.E.2d 1370, 1374 (Ind. 1993). An allegation that the trial court failed to identify or find a mitigating circumstance requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. *Matshazi v. State*, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004), *trans. denied*. Moreover, a trial court is not required to include within the record a statement that it considered all proffered mitigating circumstances, only those that it considered significant. *Id.*

1. Mental Illness

In *Weeks v. State*, 697 N.E.2d 28, 30 (Ind. 1998), the Supreme Court laid out several factors to consider in weighing the mitigating force of a mental health issue. “Those factors include the extent of the inability to control behavior, the overall limit on function, the duration of the illness, and the nexus between the illness and the crime.” *Id.* at 30.

Although the record does indicate that Herron, at least in the past, suffered from various mental illnesses, none of the *Weeks* factors ultimately help him here. First, there is no evidence that Herron has ever been unable to control his behavior, as opposed to choosing

not to. Indeed, to the extent that Herron has had opportunities for treatment, it appears that he has always refused. The trial court specifically noted Herron's "significant, long history of declining [help]" in this regard. Tr. at 54. As for the overall limitation on Herron's ability to function, again the record is devoid of evidence and seems to indicate that whatever problems Herron may have are largely due to his refusal to acknowledge that he has any kind of mental health issues.

As for the duration of any mental illness, the record indicates that the last time Herron was ever diagnosed with any specific conditions was in April of 1993 (over nine years before the instant crime), when a Dr. Watts diagnosed him with oppositional defiant disorder, post-traumatic stress disorder, and attention deficit disorder. App. at 100. Although it is hard to deny that Herron remains unwilling to conform his behavior to the norms of society, there is no evidence that this is due to any current mental illness. Finally, there is no evidence that Herron's battery of S.H. has any nexus to any of his claimed mental illnesses, even assuming, *arguendo*, that he was currently suffering from any.

2. Difficult Childhood

"[I]t is certainly true that 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" *Coleman v. State*, 741 N.E.2d 697, 701 (Ind. 2000) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)). The Supreme Court, however, has consistently held that "evidence of a difficult

childhood warrants little, if any, mitigating weight.” *Id.* at 700 (citing *Peterson v. State*, 674 N.E.2d 528, 543 (Ind. 1996) (noting that mitigating weight warranted by a difficult childhood is in the low range); *Loveless v. State*, 642 N.E.2d 974, 977 (Ind. 1994) (noting that some such evidence is occasionally declared not mitigating at all)).

Herron does not explain why he belongs in the class of those less culpable due to a difficult childhood. If anything, it would seem that most of Herron’s difficulties were brought on by his actions and were merely the unpleasant consequences of his misbehavior and failure to submit to any form of authority or accept help from others. Moreover, Herron does not explain how any of this might have caused him to brutally batter his own three-month-old daughter, leaving her permanently and profoundly disabled.

3. Guilty Plea

“[The Indiana] Supreme Court has ... determined that a guilty plea does not automatically amount to a significant mitigating factor.” *Wells v. State*, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), *trans. denied* (2006) (citing *Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999)). “For instance, a guilty plea does not rise to the level of significant mitigation where the defendant has received a substantial benefit from the plea or where the evidence against him is such that the decision to plead guilty is merely a pragmatic one.” *Id.*

Here, Herron received a benefit in exchange for his plea, in the form of the State agreeing to drop the Class D felony escape charge that could have added three years to his sentence. Although the benefit Herron received from the dropped charge is relatively small, more compelling is that Herron admitted that his decision was not due to any acceptance of

responsibility but was, rather, a pragmatic decision. In the “Defendant’s Version” of Herron’s offense, as it appears in his pre-sentence investigation report, he returns again to his claim that S.H. merely fell off the couch and admits that he pled guilty only because he did not have the resources to continue with private counsel and felt that his “public defender could [not] help [him] in trial” due to a lack of experience. App. at 93. Finally, although Herron’s guilty plea spared the State the expense of putting him on trial, it only spared it a *second* trial. Herron had already been tried once, and the State undoubtedly expended considerable resources to prepare for that trial. It stands to reason that the State would have had to expend fewer resources preparing for a second trial, so Herron’s guilty plea conferred a correspondingly lesser benefit. We conclude that the trial court did not abuse its discretion in the finding or weighing of mitigating circumstances.

The judgment of the trial court is affirmed.

NAJAM, J., and MATHIAS, J., concur.